

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PETER JASPER SCHULTE,	)	
	)	Case No. C06-436-MJP-JPD
Plaintiff,	)	
	)	
v.	)	
	)	REPORT AND RECOMMENDATION
JO ANNE B. BARNHART, Commissioner,	)	
Social Security Administration,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Peter Jasper Schulte appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”), which denied plaintiff’s application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. § 1382(a), after a hearing before an Administrative Law Judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED for further proceedings consistent with the Court’s instructions.

# I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a fifty-six year old divorced man with a high school education and an unspecified amount of college credits towards a bachelor’s degree in computer science. Administrative Record (“AR”) at 68, 183. He has previously worked as a software developer, lumberyard worker, community college tutor and teaching assistant, tile-setter, finish carpenter, and a banquet server. AR at 112, 129. Plaintiff was last gainfully employed in 2002. AR at 104. He currently receives public assistant benefits. AR at 49.

01 On February 3, 1995, plaintiff was convicted of first degree child molestation, a crime  
02 for which he spent eighty-nine months in prison. AR at 60-65. He was released on December  
03 28, 2001, but later returned to prison in March and September through November, 2002, after  
04 violating the conditions of his release. AR at 105-07, 219. Plaintiff is classified as a Level 3  
05 Sex Offender, is unable to take jobs involving direct or indirect contact with vulnerable  
06 populations or in a medical setting, and must inform any potential employment supervisors of  
07 his sex offender status. AR at 80-81, 225-30, 257.

08 Plaintiff has a past history of drug and alcohol abuse, but has participated in  
09 rehabilitation programs and asserts that he no longer has a substance abuse problem. AR at  
10 257-58, 433. Plaintiff lives alone and infrequently leaves his apartment. AR at 437, 439-41.  
11 Upon release from prison, plaintiff was placed into a community supervision program. AR at  
12 225-30. Per the terms of this supervision, plaintiff must avoid locations where minors might  
13 congregate, keep a masturbation log, dictate into a hand-held recorder his physical  
14 whereabouts, and detail any sexual fantasies or impulses he experiences during a time certain.  
15 AR at 225-30, 257; *see also* AR at 78, 80-81 (sentencing court's summary of community  
16 placement requirements). Among other restrictions, he cannot drive unless accompanied by  
17 an informed companion, and may use public transportation unless it becomes crowded with  
18 children, upon which time he must promptly exit. AR at 257. Since March 2003, plaintiff has  
19 attended a weekly mental health treatment program at Seattle Mental Health Center. AR at  
20 433.

21 On April 25, 2003, plaintiff applied for Title XVI benefits alleging an onset date of  
22 December 1, 2002. AR at 47-50. He initially alleged the following impairments: pedophilia,  
23 narcissistic personality disorder, obsessive compulsive disorder, and extreme anxiety. AR at  
24 111. Plaintiff asserts that his mental impairments have kept him from obtaining and  
25 maintaining employment of any kind. AR at 439-41.

01 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 24-  
02 26, 29-31. On August 2, 2005, a disability hearing was held before the ALJ, who concluded  
03 that plaintiff was not disabled and denied benefits based on her finding that plaintiff could  
04 perform both his past relevant work and work existing in significant numbers in the national  
05 economy. AR at 7. Plaintiff's administrative appeal of the ALJ's decision was denied by the  
06 SSA Appeals Council, AR at 6-8, making the ALJ's November 8, 2005, ruling the "final  
07 decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On April 6,  
08 2006, plaintiff timely filed the present action challenging the Commissioner's decision. Dkt.  
09 No. 1.

## 10 II. JURISDICTION

11 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
12 405(g) and 1383(c)(3).

## 13 III. STANDARD OF REVIEW

14 This Court, pursuant to 42 U.S.C. § 405(g), may set aside the Commissioner's denial  
15 of social security benefits when the ALJ's findings are based on legal error or not supported  
16 by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214  
17 (9th Cir. 2005); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). "Substantial  
18 evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence that  
19 a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*,  
20 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The  
21 ALJ is responsible for determining credibility, settling conflicts in medical testimony, and  
22 resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
23 Cir. 1995). While the Court is required to examine the record meticulously as a whole, it may  
24 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas*  
25 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more  
26 than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

01 As to specific remedies, this Court has discretion to remand for further proceedings or  
02 to award benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). Remand is  
03 appropriate where additional proceedings would remedy defects in the ALJ's decision,  
04 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989), and where the Commissioner is in a  
05 better position to evaluate the evidence. *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir.  
06 1990). An award of benefits is preferred where "the record has been fully developed and  
07 further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*,  
08 298 F.3d 1072, 1076 (9th Cir. 2002).

#### 09 IV. EVALUATING DISABILITY

10 As the claimant, Mr. Schulte bears the burden of proving that he is disabled within the  
11 meaning of the Social Security Act ("the Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
12 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
13 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
14 expected to last, for a continuous period of at least twelve months. 42 U.S.C. §§  
15 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505(a), 416.905(a). A claimant is disabled  
16 under the Act only if his impairments are of such severity that he is unable to do his previous  
17 work, and cannot, considering his age, education, and work experience, engage in any other  
18 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
19 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

20 The Commissioner has established a five-step sequential evaluation process for  
21 determining whether a person is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
22 404.1520, 416.920. The claimant bears the burden of proof for steps one to four. At step  
23 five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled or not  
24 disabled at any step in the sequence, the inquiry ends without need to consider subsequent  
25 steps.

01 Step one determines whether the claimant is presently engaged in substantial gainful  
02 activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).<sup>1</sup> If he is, disability benefits are denied. If he  
03 is not, the Commissioner proceeds to step two. At step two, the claimant must establish that  
04 he has one or more medically severe impairments, or combination of impairments, that limit  
05 his physical or mental ability to do basic work activities. If the claimant does not have such  
06 impairments, he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does  
07 have a severe impairment, the Commissioner moves to step three to determine whether the  
08 impairment meets or equals any of the listed impairments described in the regulations. 20  
09 C.F.R. §§ 404.1520(d), 416.920(d). A claimant whose impairment meets or equals a listing  
10 for the twelve-month duration requirement is disabled. *Id.*

11 When the claimant's impairment neither meets nor equals one of the impairments listed  
12 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's  
13 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
14 Commissioner evaluates the physical and mental demands of the claimant's past relevant work  
15 to determine whether he can still perform that work. *Id.* If the claimant is able to perform his  
16 past relevant work, he is not disabled; if the opposite is true, the burden shifts to the  
17 Commissioner at step five to show that the claimant can perform some other work that exists  
18 in significant numbers in the national economy, taking into consideration the claimant's RFC,  
19 age, education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the  
20 Commissioner finds the claimant is unable to perform other work, the claimant is disabled and  
21 benefits may be awarded.

## 22 V. DECISION BELOW

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24

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25  
26 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R.  
§ 404.1572.

01 In her decision of November 8, 2005, the ALJ found that although plaintiff satisfied  
 02 the first two disability steps, his severe impairments did not equal or exceed a listing at step  
 03 three. She further found that plaintiff could return to his former job as a finish carpenter, and  
 04 that, in the alternative, plaintiff retained an RFC capable of performing unskilled jobs at all  
 05 levels, with mental demands comprising of “the ability to manage simple instructions, tasks,  
 06 and usual work situations, and respond appropriately to co-workers, supervisors, and changes  
 07 in routine.” AR at 20 (citing SSR 85-15, 1985 WL 56857).<sup>2</sup> The ALJ further noted that such  
 08 jobs “ordinarily involve working with objects rather than data or people,” and thus would  
 09 likely not involve the general public or vulnerable populations. AR at 20. Because she  
 10 concluded that there were jobs in the economy that a person with plaintiff’s RFC could  
 11 perform, the ALJ found that the plaintiff was not disabled by application of Medical-  
 12 Vocational Rule 204.00. Specific findings included the following:

- 13 1. The claimant has not engaged in substantial gainful activity since the  
 14 alleged onset date [of disability].
- 15 2. The claimant has pedophilia; and anxiety disorder NOS; and a  
 16 personality disorder with narcissistic and antisocial features. These  
 17 impairments are severe, but do not meet or equal the criteria of any of  
 18 the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix No.  
 19 1.
- 20 3. The claimant’s statements concerning his impairments and limitations  
 21 are not entirely credible.
- 22 4. The claimant retains the residual functional capacity to a residual  
 23 functional capacity without physical limitations. He is somewhat  
 24 limited at interaction with supervisors, but he is able to do so  
 sufficiently well to maintain employment.
- 25 5. The claimant’s past relevant work as a finish carpenter did not require  
 26 work functions precluded by his limitations, and the claimant’s  
 impairments do not prevent him from performing his past relevant  
 work.

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25 <sup>2</sup> Social Security Rulings do not have the force of law. Nevertheless, they “constitute  
 26 Social Security Administration interpretations of the statute it administers and of its own  
 regulations,” and are given deference “unless they are plainly erroneous or inconsistent with  
 the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

- 01           6.       The claimant was born on May 29, 1949, and he has at least a high  
02           school education.
- 03           7.       If the claimant could not do his past relevant work, 20 C.F.R. §  
04           416.969, and rule 204.00 of Appendix II would direct a conclusion that  
05           he is not disabled.
- 06           8.       Although claimant has additional non-exertional limitations, they do not  
07           substantially erode the broad occupational base of unskilled work. His  
08           medical and vocational factors coincide with the framework of rule  
09           204.00 and he is capable of performing other work that exists in  
10           substantial numbers. He is therefore not disabled on that ground as  
11           well.
- 12           9.       The claimant is not under a disability, as defined in the Social Security  
13           Act.

14 AR at 24-25.

## 15 VI. ISSUES ON APPEAL

16           The plaintiff's opening brief raises a number of complaints about the decision below.  
17 In response, the Commissioner concedes error as to step four, agreeing with the plaintiff that  
18 the ALJ did not adequately develop the record to assess the physical and mental demands of  
19 plaintiff's past work as a finish carpenter when determining whether plaintiff could return to  
20 that prior relevant work. Because this error is not harmless, the Court orders that it be  
21 corrected on remand. This in turn necessitates a reassessment of plaintiff's RFC. As a result,  
22 three primary allegations of error remain contested:

- 23           1.       Did the ALJ properly evaluate the medical evidence of record?
- 24           2.       Did the ALJ err in her analysis of plaintiff's credibility?
- 25           3.       Did the ALJ err by failing to call a vocational expert at step five?

## 26 VII. DISCUSSION

### A.   The ALJ Erred in Her Evaluation of the Medical Evidence

27           Plaintiff asserts that the ALJ failed to give proper weight to the opinions of the  
28 Commissioner's examining physician, Dr. Marcia Davenport Kent, and rejected her opinions  
29 without a specific or legitimate basis. Dkt. No. 15 at 8-11. The Commissioner disagrees, and

argues that the ALJ's reasons for rejecting Dr. Kent's conclusions were specifically outlined and supported by substantial evidence—namely, Dr. Kent's *actual* conclusions, plaintiff's admissions during mental health therapy, plaintiff's 30-year employment history, and the contrary opinions of state agency non-examining psychologists Kent Reade and Harry Nelson. *See, e.g.*, Dkt. No. 17 at 8 (“The ALJ properly rejected Dr. Kent's opinion that Plaintiff was unable to work because of intrusive fantasies and deviant thoughts because it was inconsistent with the record as a whole.”).

“[G]reater weight is accorded to the opinion of an examining physician than a non-examining physician.” *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *see also* 20 C.F.R. § 416.927(d)(1). However, under certain circumstances, an examining physician's opinion can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). Such reasons must at all times be supported by substantial evidence. *Id.*

Dr. Kent conducted a detailed evaluation of Mr. Schulte on June 30, 2003, which included a review of eighteen treatment and court related documents. Dr. Kent diagnosed plaintiff with pedophilia,<sup>3</sup> voyeurism, poly-substance dependence in long term remission, anxiety NOS, and cluster B traits including narcissistic and antisocial personality traits. AR at 260. While Dr. Kent noted that plaintiff “should be able to do repetitive tasks as well as detailed and complex tasks with ease,” she found that plaintiff would “have significant

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<sup>3</sup> The *Diagnostic and Statistical Manual of Mental Disorders IV* defines pedophilia as a paraphilia—that is, a disorder causing “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535 (Text. Rev., 4th ed. 2000).



01 difficulty interacting with the public and supervisors.” AR at 261. Dr. Kent further opined as  
02 follows:

03 In the absence of sexual deviancy which puts him at risk to the community, he  
04 may have significant job skills. However his risk for re-offense *and* constant  
05 obsession with sexuality, masturbation, voyeurism, and pedophilia pose  
06 significant barriers to functioning successfully in the work place.

07 . . . .

08 Mr. Schulte’s work day and work week will be interrupted by fantasies, sexual  
09 deviancy, difficulty with honesty and communication with others.

10 *Id.* (emphasis added).

11 The ALJ first rejected Dr. Kent’s conclusion that plaintiff would have significant  
12 barriers to functioning in the workplace because, in the opinion of the ALJ, that conclusion  
13 was limited to plaintiff’s “label as a sex offender and his probation restrictions, rather than the  
14 limitations imposed by his impairments.” AR at 18.

15 The ALJ erred. Dr. Kent did not limit her functional assessment opinions to plaintiff’s  
16 sex offender label, stigma, or probation restrictions. To the extent this limitation was made by  
17 the ALJ herself, it must be corrected upon remand, for an ALJ cannot substitute her own  
18 opinion for that of a medical expert by disregarding or manipulating the evidence of record.  
19 *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004). In fact, Dr. Kent did not base her  
20 opinion solely on her diagnosis of the mental illness known as pedophilia. Rather, Dr. Kent’s  
21 opinion states that plaintiff’s risk of re-offense “and constant obsession with sexuality,  
22 masturbation, voyeurism, *and* pedophilia” presented significant barriers to functioning in the  
23 workplace. AR at 261 (emphasis added). The fact that the same mental impairments which  
24 might prevent plaintiff from maintaining employment may have also contributed to his  
25 incarceration does not minimize those impairments for the purposes of determining disability  
26 under the Act. Dr. Kent’s report links plaintiff’s mental impairments—later found to be severe  
by the ALJ—to the resulting functional limitations quoted above. “[O]nly by . . .

01 mischaracterizing [Dr. Kent's] statements can one create any apparent inconsistency" or  
02 limitation in her diagnosis. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

03 The ALJ also rejected Dr. Kent's functional limitations assessment by simply ignoring  
04 the evidence of record. Specifically, although Dr. Kent found that claimant's work would be  
05 interrupted by his mental impairments, the ALJ rejected this finding, concluding that "there is  
06 no evidence that the claimant's fantasies and deviant sexual thoughts have ever interrupted his  
07 work activities." AR at 18. Again, the ALJ erred. The record shows that plaintiff has been  
08 arrested in the past for committing a sex crime—child molestation—while at work. AR at  
09 181-82 (Department of Corrections Records).

10 Finally, the ALJ rejected Dr. Kent's opinions based in part on the findings of Drs. Kent  
11 Reade and Harry Nelson of the State Disability Determination Service. These state agency  
12 psychologists concurred in Dr. Kent's diagnoses of pedophilia, voyeurism, poly- substance  
13 abuse in remission, and cluster B traits, although to a lesser extent. AR at 374-90. Drs.  
14 Reade and Nelson found that plaintiff was moderately limited in his ability to respond to  
15 supervisors, moderately limited in maintaining social functioning, and mildly limited in  
16 maintaining concentration, persistence, or pace. AR at 375, 388. Nevertheless, the ALJ  
17 rejected the application of a moderate limitation in social functioning by once again attributing  
18 to himself or the state agency physicians the conclusion that "the assessment of a moderate  
19 limitation in social functioning relates to [plaintiff's] problems with sexually abusing children  
20 and the inability to be exposed to children." AR at 19.<sup>4</sup>

21 This, too, constitutes error. First, the report of the state agency physicians, like that of  
22 Dr. Kent, simply does not limit the "moderate" social functional limitation findings in *both*  
23 criteria A and criteria B to criminal sexual abuse and the physical restrictions resulting  
24 therefrom. That statement refers to Dr. Kent's finding of "*significant* barriers to  
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26 <sup>4</sup> The Court is unsure from exactly where the ALJ extracted this information, because she made no specific citation to the administrative record when doing so.

01 functioning . . . in the workplace”—a finding in which the state agency physicians did not  
02 concur—and must be read in conjunction with Dr. Reade and Dr. Nelson’s RFC ultimate  
03 determination that plaintiff was moderately limited in his “ability to accept instructions and  
04 respond appropriately to criticism from supervisors.” AR at 375, 376. Second, even  
05 assuming that Drs. Reade and Nelson *did* read Dr. Kent’s social functioning assessment as  
06 limited to legal and not psychiatric consequences, the Court finds that such a determination  
07 does not contain the specificity necessary to outweigh the opinions of Dr. Kent. A non-  
08 examining physician’s nonspecific rejection of an examining physician’s opinions cannot later  
09 become, absent other evidence, the “specific and legitimate” reasons of the ALJ. *Cf. Reddick*,  
10 157 F.3d at 725 (“ALJ may not reject [contradicted] opinion [of examining physician] without  
11 providing specific and legitimate reason supported by substantial evidence in the record.”); *see*  
12 *also Widmark v. Barnhart*, 454 F.3d 1063, 1067 (9th Cir. 2006) (“The opinion of a  
13 nonexamining physician cannot by itself constitute substantial evidence that justifies the  
14 rejection of the opinion of . . . an examining physician.”) (internal quotation omitted).

15 In sum, the ALJ’s reasons for rejecting Dr. Kent’s conclusions were neither specific  
16 nor legitimate. Nor were such reasons supported by substantial evidence. Additional  
17 arguments offered in defendant’s brief were not made by the ALJ, and thus will not be  
18 addressed by this Court. Because the ALJ’s errors in this regard led to an adverse disability  
19 finding, they were not harmless. On remand, the ALJ should credit and fully incorporate the  
20 opinions of Dr. Kent when reviewing the medical opinions of record and reassessing the  
21 plaintiff’s RFC. *Edlund v. Massanari*, 253 F.3d 1152, 1160 (9th Cir. 2001) (“[B]ecause the  
22 ALJ fail[ed] to provide adequate reasons for rejecting the opinion of [an] examining physician,  
23 we credit that opinion as a matter of law.”) (first and third alterations added). Furthermore,  
24 the ALJ should not attempt to contradict the functional limitation assessments of examining  
25 and non-examining physicians by unsupported statements or medical evidence of his own.  
26 *Lester v. Chater*, 63 F.3d 1453, 1463-64 (9th Cir. 1995).

01 B. The ALJ Should Re-evaluate the Plaintiff's Subjective Symptom Testimony on  
02 Remand

03 Plaintiff argues that the ALJ improperly discredited his subjective complaints and  
04 found plaintiff not credible based on insufficient "general findings." Dkt. No. 15 at 16-17.  
05 Defendant argues that the ALJ properly found that plaintiff's subjective allegations of  
06 disability were not entirely credible based on plaintiff's documented history of deceptive  
07 behavior and manipulation during treatment, inconsistent testimony, and reported effectiveness  
08 of medical treatment.

09 Credibility determinations are particularly the province of the ALJ. *Andrews*, 53 F.3d  
10 at 1043. Nevertheless, when an ALJ discredits a claimant's subjective testimony, she must  
11 articulate specific and adequate reasons for doing so. *Greger v. Barnhart*, 464 F.3d 968, 972  
12 (9th Cir. 2006). The determination of whether to accept a claimant's subjective symptom  
13 testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at  
14 1281; SSR 96-7p. First, the ALJ must determine whether there is a medically-determinable  
15 impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R.  
16 §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant  
17 produces medical evidence of an underlying impairment, the ALJ may not discredit the  
18 claimant's testimony as to the severity of symptoms solely because they are unsupported by  
19 objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc).  
20 Absent affirmative evidence that the claimant is malingering, the ALJ must provide "clear and  
21 convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick*,  
22 157 F.3d at 722.

23 When evaluating a claimant's credibility, the ALJ "must specifically identify what  
24 testimony is credible and what testimony undermines the claimant's complaints." *Greger*, 464  
25 F.3d at 972 (internal quotation omitted). General findings are insufficient. *Smolen*, 80 F.3d at  
26 1284; *Reddick*, 157 F.3d at 722. The ALJ may consider "ordinary techniques of credibility  
evaluation" including the claimant's reputation for truthfulness, inconsistencies in his

01 testimony or between his testimony and conduct, his daily activities, work record, and  
02 testimony from physicians and third parties concerning the nature, severity, and effect of the  
03 symptoms of which claimant complains. *Smolen*, 80 F.3d at 1284.

04 Here, there are no allegations that plaintiff was malingering, so the ALJ was required  
05 to provide clear and convincing reasons for rejecting his testimony. *Reddick*, 157 F.3d at 722.  
06 The ALJ failed to meet her “clear and convincing” burden when she discredited the plaintiff’s  
07 testimony and medical records regarding his impairments in social functioning because “he  
08 [testified] that he occasionally attends church and visits neighbors or his landlord,” and is “able  
09 to read, cook, exercise, and socialize.” AR at 18. The ALJ apparently found plaintiff’s  
10 statements concerning his impairments “not entirely credible” because she believed that the  
11 above-quoted activity was inconsistent with plaintiff’s alleged inability to maintain social  
12 functioning, concentration, persistence or pace in a work environment. However, these  
13 categories are not necessarily mutually exclusive. The fact that plaintiff can infrequently  
14 attend church, cook meals once a week, grocery shop once a month, or engage in an  
15 occasional conversation with his landlord does not mean he is capable of continuously and  
16 consistently performing in a structured work environment. *See* 20 C.F.R. § 404, Subpt. P.,  
17 App. 2, § 200.00(c) (defining RFC as “the maximum degree to which the individual retains  
18 the capacity for *sustained* [work].”) (emphasis added). Such reasons offered by the ALJ are  
19 insufficient for rejecting plaintiff’s testimony. On remand, the ALJ should be required to  
20 evaluate plaintiff’s testimony properly, or provide clear and convincing reasons for rejecting it.

21 C. ALJ Erred by Failing to Call a Vocational Expert at Step Five

22 Plaintiff argues that the ALJ erred by failing to hear testimony from a Vocational  
23 Expert (VE) at step five of the sequential evaluation process despite the presence of significant  
24 non-exertional impairments. Dkt. No. 15 at 15-16; Dkt. No. 18 at 2-3. The Commissioner  
25 responds that the ALJ was not required to call a VE and was permitted to rely on the  
26

01 framework of the Medical-Vocational Guidelines because she properly found plaintiff capable  
02 of performing unskilled work. Dkt. No. 17 at 11-13.

03 When a claimant has established he suffers from a severe impairment that prevents him  
04 from performing any work he has done in the past, the claimant has made a *prima facie*  
05 showing of disability. “At this point—step five—the burden shifts to the Commissioner to  
06 show that the claimant can perform some other work that exists in ‘significant numbers’ in the  
07 national economy, taking into consideration the claimant’s residual functional capacity, age,  
08 education, and work experience.” *Tackett*, 180 F.3d at 1100 (citing 20 C.F.R. §  
09 404.1560(b)(3)). Ordinarily, the Commissioner can meet this burden in one of two ways: (a)  
10 by the testimony of a vocational expert, or (b) by reference to the Medical-Vocational  
11 Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2 (“Guidelines”).

12 The Guidelines are a matrix system used to determine whether substantial gainful work  
13 exists for claimants with substantially uniform levels of impairment. *Tackett*, 180 F.3d at  
14 1101. The Guidelines categorize work by exertional level (sedentary, light, or medium) and  
15 contain various factors relevant to a claimant’s ability to find work, including age, education,  
16 and work experience. When a claimant’s qualifications correspond to job requirements, the  
17 Guidelines direct a conclusion of whether work exists that the claimant could perform, and if  
18 such work exists, the claimant is considered not disabled.

19 Because the Guidelines categorize jobs by their physical exertion requirement, their use  
20 is appropriate when it is established that a claimant suffers from exertional impairments. Thus,  
21 when a plaintiff suffers from significant *non*-exertional impairments, resort to the Guidelines is  
22 inappropriate, and the ALJ may not mechanically apply them to direct a finding of disability.  
23 *See Widmark*, 454 F.3d at 1069 (“[T]he ALJ may rely on the Guidelines alone ‘only when the  
24 [Guidelines] accurately and completely describe the claimant’s abilities and limitations.’”)  
25 (quoting *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)); *Bruton v. Massanari*, 268 F.3d  
26 824, 827 (9th Cir. 2001) (same). Instead, the ALJ must use the principles in the appropriate

01 sections of the regulations to determine whether the claimant is disabled. *Tackett*, 180 F.3d at  
02 1101-02; SSR 85-15, 1985 WL 56857, at \*1. Furthermore, when an ALJ uses the Guidelines  
03 as a framework to evaluate non-exertional limitations not specifically contemplated by the  
04 Guidelines, she must call upon a VE. *Tackett*, 180 F.3d at 1102. In such a scenario, the ALJ  
05 must provide the VE with an accurate and detailed description of the claimant's impairments,  
06 as reflected by the medical evidence of record. *Id.* at 1101.<sup>5</sup>

07 Here, the ALJ failed to call a VE at step five after finding plaintiff suffered from severe  
08 non-exertional impairments at step two. AR at 16, 20. Instead, and without any assistance,  
09 citation, or explanation, the ALJ concluded that plaintiff's "non-exertional limitations . . . do  
10 not substantially erode the occupational base of unskilled work." AR at 21. Because  
11 plaintiff's severe impairments were purely non-exertional, the ALJ should have called a VE to  
12 determine exactly what work plaintiff was capable of performing. Rather than doing so, it  
13 appears that the ALJ summarily discounted the effects of plaintiff's severe impairments and  
14 instead used the Guidelines to make her own quasi-expert determination that plaintiff was not  
15 disabled.

16 The ALJ's failure to call a VE constitutes reversible error. *Tackett*, 180 F.3d at 1102.  
17 In light of the deficiencies associated with the ALJ's decision at step five, the Court makes no  
18 finding on the propriety of the ALJ's conclusion that plaintiff's non-exertional limitations  
19 would not significantly erode the occupational base considered in section 204.00 of the  
20 Medical-Vocational Guidelines. Although the Court is skeptical that a VE could find, in light  
21 of the conclusions of Dr. Kent and the balance of medical evidence, that claimant's

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23 <sup>5</sup> The Commissioner may meet this step five burden by propounding to the VE a  
24 hypothetical question that, at the very least, adequately reflects all the claimant's impairments  
25 and limitations supported by substantial evidence in the record. *Magallanes*, 881 F.2d at 756-  
26 57. Using the VE, the ALJ must determine whether plaintiff is capable of his past relevant  
work, and if not, whether his relevant work skills are transferable to other jobs. If such skills  
are not transferable, the ALJ must then determine whether the plaintiff is capable of  
performing any unskilled work. SSR 85-15.

01 impairments do not substantially erode the occupational base of unskilled work, enabling  
02 performance of various types of work that exists in significant numbers in the national  
03 economy, this determination lies first with the ALJ on remand. *Thomas*, 278 F.3d at 954.


04 On remand, the ALJ must require a VE to provide testimony concerning the full  
05 vocational impact of all plaintiff's impairments, including his difficulties maintaining  
06 concentration, persistence or pace, his ability to respond to supervisors, and his ability to  
07 maintain social functioning. The VE should also testify as to the availability of jobs in the  
08 economy, if any, for which plaintiff is qualified.

#### 09 VIII. CONCLUSION

10 Because the ALJ erred in her evaluation of medical evidence, erred in her step four  
11 analysis, erred by failing to hear testimony from a vocational expert at step five, and  
12 improperly discredited plaintiff's subjective symptom complaints, this case should be  
13 REVERSED and REMANDED for further proceedings not inconsistent with this report and  
14 recommendation. In particular, the ALJ should reevaluate the medical evidence, reassess  
15 plaintiff's credibility, apply the "special technique" for evaluating mental impairments under 20  
16 C.F.R. § 416.920a, give proper weight to the opinions of Dr. Kent, and finally, hear testimony  
17 from a VE concerning the full vocational impact of all plaintiff's impairments based on, among  
18 other things, a reassessment of plaintiff's RFC. This testimony shall include answering a  
19 hypothetical that takes into account all of plaintiff's limitations found after considering this  
20 additional evidence. With this information, the ALJ should then apply all appropriate steps of  
21 the sequential evaluation process to determine whether plaintiff's severe impairments render  
22 him disabled for purposes of Title XVI of the Social Security Act, 42 U.S.C. § 1382(a). A  
23 proposed order accompanies this report and recommendation.



DATED this 9th day of November, 2006.

  
JAMES P. DONOHUE  
United States Magistrate Judge